Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1055

OMAR M. LUNSFORD,

Petitioner,

vs.

INVESTORS DIVERSIFIED SERVICES, INC. AND IDS LIFE INSURANCE COMPANY (SUED HEREIN AS INVESTORS SYNDICATE LIFE INSURANCE AND ANNUITY COMPANY),

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED.

Whether the court of appeals erred in affirming the district court's grant of summary judgment for respondents in a wrongful termination action where agreements for services were terminated in accordance with their unambiguous terms.

STATEMENT OF THE CASE.

Petitioner Omar M. Lunsford was a divisional sales manager for respondents Investors Diversified Services, Inc. ("IDS") and IDS Life Insurance Company ("IDS Life") until his termination

on November 11, 1974. From January, 1967 until November, 1974, his office was in Muncie, Indiana. Before 1967, he was respondents' divisional sales manager in Lima, Ohio.

Petitioner entered into a Divisional Sales Manager Agreement with IDS effective August 1, 1968. Effective January 1, 1969, he entered into a Divisional Sales Manager Agreement with IDS Life. (Pet. App. 3d) Each Agreement provided in substantially identical terms that it could be terminated by either party without cause on thirty days' notice.[1] On October 9, 1974, respondents gave petitioner thirty days' written notice of termination. In accordance with the Agreements, petitioner was paid his overwritings and commissions through November 11, 1974. (Pet. App. 3d-4d)

Petitioner instituted this federal diversity[2] action in the United States District Court for the Southern District of Indiana on April 27, 1975, seeking damages arising out of the allegedly wrongful termination of his Agreements. The complaint, as finally amended, was in two counts. The first count alleged that Petitioner had been promised lifetime employment[3] by the respondents for which he gave valuable consideration over and above the duties required under his Agreements. The second count alleged that he had been wrongfully terminated.

Based upon the allegations in the complaint and the deposition testimony of petitioner, respondents moved for summary judgment. Petitioner failed to tender to the court any statement of genuine issues of fact as required by Local Rule 10 of the

1. Using almost identical language each Agreement provided: "This Agreement may be terminated by either party without cause upon thirty (30) days written notice to the other party. . . ." (Pet. App. 4d)

2. The Agreements provided that they would be governed by the law of Minnesota. Both the district court and the court of appeals applied Minnesota law.

3. Respondents have consistently disputed that petitioner was their employee. For purposes of the issue presented to this Court, petitioner's status as an employee is irrelevant.

Southern District of Indiana.[4] The case was submitted on briefs and oral argument.

On November 23, 1976, the district court found there were no issues of material fact in dispute and entered summary judgment in favor of respondents. (Pet. App. 2d) It held that even if the vague oral promises of lifetime employment on which petitioner relied had been made before execution of the Agreements, they had been integrated in the Agreements and were insufficient as a matter of law to vary the unambiguous, express termination provisions. (Pet. App. 5d) It further reasoned that petitioner's reliance on two statements of respondents' regional manager made after execution of the Agreements[5] was misplaced since (a) the statements were so vague and indefinite that they created no enforceable obligation; and (b) the promise of lifetime employment creates an indefinite term of hiring at will. (Pet. App. 7d-8d) Finally, the district court rejected petitioner's contention that he had provided sufficient additional consideration to make the alleged promises of lifetime employment enforceable. It found that the acts asserted as providing additional consideration, the refusal to seek or accept other employment opportunities, his relocation by respondents from

4. Local Rule 10 provides, *inter alia*:

"Any party opposing the motion [for summary judgment] shall within fifteen (15) days from the date such motion is served upon him, serve and file any affidavits or other documentary materials controverting the movant's position, together with answer brief and a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

"In determining the motion for summary judgment, the court will assume the facts as claimed by the moving party are admitted to exist without controversy, except as and to the extent that such facts are actually in good faith controverted in the 'statement of genuine issues' filed in opposition to the motion, as supported by the depositions, answers to interrogatories, admissions, and affidavits on file."

5. Petitioner testified that Respondents' regional manager told him, in substance, that he "had a job as long as the company is here" and "until he retires".

Lima, Ohio to Muncie, Indiana and the performing of church-related community services, were insufficient as a matter of law to serve as consideration for the alleged promises. (Pet. App. 9d-11d)

On appeal to the United States Court of Appeals for the Seventh Circuit, that court adopted the district court's reasoning and affirmed its judgment. (Pet. App. B) This petition followed.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

The Court of Appeals and District Court Correctly Applied Settled Principles of Minnesota Law.

Petitioner has provided no reason that would justify this Court's review of the case at bar. The facts are simple and not in dispute.[6] Petitioner and respondents executed written Agreements. Petitioner relied on those Agreements to provide the foundation for his claims. Each Agreement expressly and unequivocally provided that it could be terminated by either party without cause on thirty days' notice. Respondents complied with each termination provision. Petitioner finds himself in the unsupportable position of having to contend to this Court, as he contended to both lower courts, that when he solemnly and expressly agreed that his Agreements could be terminated without cause, the parties meant exactly the opposite—that the Agreements could not be terminated because they were for lifetime employment.

In his effort to overcome normal principles of contract interpretation and application, petitioner first contends that *Perry* v. *Sinderman*, 408 U. S. 593 (1972), because it recognized a contractual expectancy arising out of custom and usage, demonstrates that summary judgment was inappropriate in the instant case. (Pet. pp. 7-9) In *Perry*, this Court was confronted with

6. The facts that were before the district court were established by petitioner's deposition testimony and the pleadings.

defining the rights of a state college teacher to procedural due process of law under the 14th Amendment and to freedom of speech under the 1st Amendment to the Constitution. The teacher claimed a right to renewed employment based on teacher tenure rights and he offered to make a direct and specific factual showing of a practice in that particular college of providing the equivalent of teacher tenure. This Court simply recognized the possibility of implying a contract by the use of such a practice to supplement a written agreement on a subject not covered, in the context of the preservation of important constitutional rights.

That is a far different case from the instant case where there is no alleged deprivation of constitutional rights[7]; where the custom or usage, if any, would serve to abrogate express contractual provisions; where there had been no offer of a specific factual showing that such a custom or usage might exist; and where by failing to file a statement of genuine issues in response to the motion for summary judgment, as required by the local district court rules, petitioner did not even provide the district court the framework for the assertion of custom and usage. While in the law of contracts, custom and usage is frequently taken into account in determining the intention of contracting parties, in the instant case there is no factual basis on which to find or infer that there was any custom, usage or practice that would contradict the express agreement reached between petitioner and respondents.

Petitioner also quotes extensively from a series of Minnesota cases dealing with licenses and franchise agreements that are as irrelevant as *Perry, supra,* when considered in the context of the instant action. For example, petitioner cites *Miller* v. *O. B. McClintock Co.*, 210 Minn. 152, 297 N. W. 724 (1941) for the proposition that termination-at-will provisions are disfavored in Minnesota law. His quotation is misleading since the court

7. Petitioner has cited the 14th Amendment to the Constitution as the constitutional provision involved in his petition. (Pet. p. 5) Its citation is a mystery, however, since there has never been any suggestion of state action or due process being issues in this cause.

reached its conclusion only because "[t]he right of either party to terminate the contract at will [did] not clearly appear" from the contract. *Id.*, 297 N. W. at 729. The contract at issue in *Miller* had at least three ambiguous and apparently inconsistent provisions relating to termination. Moreover, the *Miller* court expressly recognized *in dictum* that "[O]ne of the parties to a contract may terminate it if it so provides." *Id.* The Agreements in the case at bar contain unambiguous provisions allowing termination by either party without cause, on thirty days' notice. There can be little doubt that following the termination provisions in those Agreements is entirely consistent with Minnesota law.

Even less relevant are *Clausen & Sons* v. *Theo. Hamm Brewing Co.*, 395 F. 2d 388 (CA 8, 1968) and *Ag-Chem Equipment Co., Inc.* v. *Hahn, Inc.*, 480 F. 2d 482 (CA 8, 1973). Each case involved termination of an exclusive distributorship. Each involved oral, not written, contracts silent on the subject of termination. Each involved substantial investments by the terminated distributor. Each is a classic "recoupment" case. *Clausen* teaches that where a franchisor encourages a franchisee to invest a substantial amount of his resources and credit to purchase, store, and distribute a product, with the attendant real estate, personnel, advertising and equipment needs, the franchisor ought not be allowed to terminate, as a matter of legal implication, without giving the franchisee a chance to recoup his investment. *Ag-Chem, supra,* follows *Clausen*. Neither case holds, however, that a Minnesota court would disregard an unambiguous, express contractual provision relating to termination.[8] Nor has petitioner explained to any court, or pointed to any facts in the record that would illustrate, why he should fall within the recoupment principle.

8. Indeed the court in *Ag-Chem* expressly recognized that,

> "[U]nder Minnesota law, as is generally true elsewhere, a contract having no definite duration is terminable at will by either party upon reasonable notice to the other." *Ag-Chem Equipment Co., Inc.* v. *Hahn, Inc.*, 480 F. 2d 482, 487 (CA 8, 1973).

Petitioner contends that statements made both before[9] and after the execution of the Agreements modified them to create "lifetime" or "permanent" employment contracts. Even if petitioner were correct, the law of Minnesota, as with the law of most jurisdictions, generally deems contracts for lifetime employment to be terminable at will. Thus, even if the vague, unspecific statements on which petitioner relied did give rise to something approaching a contract, the result would be the same—the district court's grant of summary judgment was correct.

The leading Minnesota case on "lifetime" contracts is *Skagerberg* v. *Blandin Paper Co.*, 197 Minn. 291, 266 N. W. 872 (1936). There plaintiff alleged, and a general demurrer established, that he had been promised "permanent" employment. After performing satisfactorily for a period of time, he was discharged without cause. The Minnesota Supreme Court affirmed the order of the trial court sustaining the demurrer. It set forth the law as it remains today in that state:

> "The words 'permanent employment' have a well-established meaning in the law. . . .' [Where] the parties to a contract of service expressly agree that the employment shall be "permanent" the law implies, not that the arrangement shall be continuous or for any definite period, but that the term being indefinite the hiring is merely at will.' "

Skagerberg was followed in *Degen* v. *Investors Diversified Services, Inc.*, 260 Minn. 424, 110 N. W. 2d 863 (1961). In *Degen,* the plaintiff sued respondent IDS for breach of an alleged lifetime employment contract.[10] The Minnesota Supreme

9. Recently the Minnesota Supreme Court reaffirmed that statements made before execution would be inadmissible to vary unambiguous contractual provisions, saying:

> "The law is clear that oral evidence of discussions, negotiations, or understandings is not admissible to vary or contradict the terms of a clear, unambiguous, and integrated written contract." *Jansen* v. *Herman,* 304 Minn. 572, 230 N. W. 2d 460, 463 (1975).

10. The president of IDS told Degen the day he began that he should "consider this a career situation, and not . . . as temporary

(Footnote continued on next page.)

Court affirmed summary judgment for defendant since the alleged contract was for an indefinite period, terminable at the will of either party. The court observed:

> "The evidence upon which plaintiff relies to establish a lifetime employment contract with Investors is wholly inadequate to sustain a finding to such effect. Viewed in the light most favorable to him, it establishes rather that his contract with Investors was for an indefinite term and hence terminable at the will of either party. The fact that at different times various officers and agents of Investors had assured him that his position was a 'career position'; that Investors had great future prospects and that if he continued in his employment with it he would be well paid in future years; that he could look upon his job as one with a great deal of promise and consider it as a career; and that a day would come when he would be rewarded for past efforts fall far short of establishing a lifetime contract." *Id.* 110 N. W. 2d at 866.

Relying on *Skagerberg*, the court stated:

> "[W]here [as here] there is no specified period, when it is admitted that the employee could have quit at any time, as he himself states he could, it is the rule as stated in the Skagerberg case and generally in the United States that such a contract is terminable at will by either party." *Id.*, 110 N. W. 2d at 866.

Despite the remarkably similar facts pattern, petitioner attempts to distinguish *Degen*, as he has throughout the course of this litigation, by arguing that the plaintiff in that case was a "salaried desk bound, office employee under no contract, no covenant not to compete, no commissions and . . . no higher than ordinary commissions. . . ." He cites no authority for the legal

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(Footnote continued from preceding page.)
employment." *Degen* v. *Investors Diversified Services, Inc.*, 260 Minn. 424, 110 N. W. 2d 863, 864-65 (1961). Another official told him that "he shouldn't look forward to anything else but a long career with the company." *Id.* at 865. Various officers between 1948 and 1954 told him he was doing a fine job and should "stay with the ship", that he should look upon his employment as a "career situation" and that he had a great future with the company. *Id.*

effect these "distinctions" are supposed to have. If anything, an employee with no written contract should be in a better position to assert that statements made by superiors led to a "lifetime" contract than petitioner, who in written Agreements agreed to express, unambiguous termination provisions.

Petitioner places his prime reliance on *Bussard* v. *College of St. Thomas, Inc.*, 294 Minn. 215, 200 N. W. 2d 155 (1972), a case which, as petitioner's quotation emphasizes, both recognizes the *Skagerberg* rule and avoids its reexamination. *Bussard* illustrates that it is possible to establish a lifetime contract in a "compelling circumstance" where an employee furnishes valuable consideration other than his customary daily services. Plaintiff there, for example, made a gift to the defendant of stock valued at over $350,000 on the express condition that he would remain as the publisher of the "Catholic Digest". *Id.*, 200 N. W. 2d at 159. This suit successfully enforced an oral contract for lifetime employment which made no reference to termination.

Wisely, petitioner concedes that the "additional consideration" he gave respondents is not analogous to that given in *Bussard, supra.* (Pet. p. 13) For reasons that will become obvious, petitioner has chosen not to indicate to this Court the nature of the additional consideration which he asserted would support a lifetime employment agreement. It fell within three categories: (a) refusal to accept or seek other employment; (b) relinquishment of his former position and relocation; and (c) community services.

Although petitioner testified that he refused other employment offers, he testified in deposition that he could not recall the name of anyone who had made him an employment offer and he also testified he was not interested in seeking other employment. In *Degen, supra,* the same argument petitioner advanced to the courts below was made and rejected since the asserted additional considerations bore no relation to the consideration forming the basis of the employment contract. *Id.*, 110 N. W. 2d at

867. Petitioner has cited no authority, Minnesota or otherwise, to the contrary.

Petitioner also urged that the relinquishment of his former position and his relocation provided the necessary "additional consideration." But the job he relinquished was with respondents. The relocation was simply a transfer to the new divisional office. Respondents reimbursed petitioner for all moving expenses incurred in the transfer. Again, petitioner has cited no Minnesota authority holding that this kind of relinquishment and relocation is sufficient additional consideration to support a lifetime employment contract. Moreover, the move occurred over a year and a half before the execution of the Agreements containing the termination-without-cause provisions.

The community services petitioner sought to use as support for the permanent employment claim were, in fact, services rendered at the instance of his friends or because of his children's interest in church affairs or to enhance his business. There is no authority holding that these were even incidental to the services petitioner had an obligation to perform for respondents. Nor was there a hint of a suggestion that the rendition of these services was bargained for as consideration for a lifetime employment contract.

Finally, petitioner contends that since Minnesota law allows the original consideration to an executory contract to attach to an oral modification, the statements made by respondents' regional manager after execution of the Agreements created lifetime contracts. Petitioner testified that the regional manager told him "he had a job as long as the company is here" and "until he retires" sometime after he had entered into the Agreements. Not only does the vagueness of these statements emphasize the *Degen* court's rationale for the hostility that has been shown lifetime contracts—they are "'. . . often oral, uncorroborated, vague in important details and highly improbable. . . .'" *Degen, supra*, 110 N. W. 2d at 866 (quoting with favor *Lee* v. *Jenkins Brothers*, 268 F. 2d 357, 368 (CA 2, 1959))—but at best

they result in creation of a lifetime contract that under Minnesota law is terminable at will. Petitioner has cited no authority for the proposition, raised for the first time in his petition, that any of the consideration forming a part of the original consideration for the Agreements is sufficient to support a lifetime employment contract.

CONCLUSION.

While not clearly articulated, the sole basis petitioner has attempted to argue to this Court that would justify its assertion of discretionary jurisdiction is that the decision of the court of appeals conflicts with the applicable law of Minnesota. As the cases clearly illustrate, there is no conflict. Petitioner has advanced no other justification for reviewing this cause. Accordingly, respondents respectfully request this Court to refuse the petition for certiorari.

Respectfully submitted,

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